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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 295.

OCTOBER TERM, 1933.

FLORENCE SAMUELS LANDRESS,
Petitioner,

versus

PHOENIX MUTUAL LIFE INSURANCE COMPANY
and
TRAVELERS INSURANCE COMPANY,
Respondents.

CONSOLIDATED CAUSES.

PETITION FOR CERTIORARI AND SUPPORTING BRIEF.

WILLIAM L. FRIERSON,
Attorney.

R. H. WILLIAMS,
R. P. FRIERSON,
Of Counsel.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 4477.

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CONSOLIDATED CAUSES.

PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner, Florence Samuels Landress, prays that the writ of certiorari be granted to review the judgment of the Circuit Court of Appeals for the Sixth Circuit rendered June 6, 1933, whereby that Court affirmed the judgment of the District Court for the Southern Division of the Eastern District of Tennessee sustaining demurrers and dismissing petitioner's suits (Rec., p. 27).

THE CASE.

Petitioner sued the two respondents, in separate suits, in a state court, on policies of accident insurance in which her husband was the insured and she was the beneficiary. The suits were properly removed to the United States District Court, and there, by consent of parties, consolidated (Rec., pp. 1 and 16).

CAUSE OF ACTION.

The insured was overcome by heat while playing golf and died. The policies sued on provided for payments to petitioner if the death of her husband should result, in the case of one respondent,

> directly and independently of all other causes from bodily injuries effected through external, violent and accidental means, and not directly or indirectly, wholly or partly, from disease or physical or mental infirmity (Rec., p. 3).

And, in the case of the other respondent,

> from bodily injuries effected directly or independently of all other causes, through external, violent and accidental means (Rec., p. 6).

THE DECLARATION.

Each declaration contains four counts, and all the counts, after setting out the provisions of the policy and alleging

compliance with respect to proofs of loss, alleged the circumstances of insured's death in this language:

> He was accustomed to play and did frequently play golf in the afternoon during the summer months. On the afternoon of August 5, 1930, he was in his usual good health and not suffering from any disease or any mental or physical infirmity, and was playing golf as he often did when the weather was such as it was on that day, and as many others did without injury on that afternoon and on the same golf links. But while so playing he was suddenly and unexpectedly overcome by the force of the sun's rays upon his head and body and died within an hour or two. An autopsy revealed that there was no bodily infirmity or disease which could have been a contributing cause of his death (Rec., pp. 3-5 and 6-8).

The second count added this:

> At the time plaintiff's said husband received the bodily injury which resulted in his death, he was engaging in his accustomed recreation in which he and thousands of others constantly engaged without injury even on hot days, and the injury which followed was not the ordinary, natural or reasonably to be expected result of playing golf. Plaintiff's husband was playing golf unconscious of any danger from the heat of the sun, and the injury which resulted in his death was not one which followed in a not unusual or unexpected way from any intentional act of his. It did not happen according to the usual course of things or as expected (Rec., pp. 4 and 7).

The fourth count added this:

> Accidents do sometimes happen to those playing golf, but are not the usual and ordinary incidents of that game, and the double indemnity provisions of said policies do not exclude risks incident to playing golf. It was only by chance that on the day in question plaintiff's husband happened to be the one out of the many playing with whom the rays of the sun came in contact in such a way as to cause injury (Rec., pp. 5 and 8).

And the third count added this:

> At the time plaintiff's said husband received the injury which resulted in his death, there was, but unknown to him, a temporary disorder or condition in his body, not amounting to a mental or physical infirmity withing the meaning of the policies, which, for the time being, rendered him more than ordinarily sensitive to the heat of the sun. This temporary and unknown condition intervened between his intentional act in playing golf, which he intended and expected to perform safely and which others did perform safely at the same time and place, and the injury followed (Rec., pp. 5 and 8).

THE DEMURRERS.

Employing various forms of expression, the demurrers, in their eleven grounds, insist that, on the facts alleged, insured's death did not result from bodily injuries effected through external, violent and accidental means (Rec., pp. 10-13).

GROUNDS OF DECISION BELOW.

The court below, agreeing with the Court of Appeals in the case of Order of United Commercial Travelers v. Shane, 64 Fed. (2nd) 55, held that the first, second and fourth counts failed to state a cause of action because it did not affirmatively appear that, in the act of playing golf, anything intervened to cause insured to do anything he did not intend to do or in a way he did not intend, and rejected the idea based on the third count that ignorance of a condition which made the otherwise safe playing of golf dangerous, converted the otherwise intentional act of playing into an unintentional and, therefore, accidental act (Rec., pp. 29 and 30).

REASONS FOR GRANTING WRIT.

1. **Important questions of general law.**

The language in question is and has been for years used by most insurance companies in their accident policies. It is the subject matter of almost constant litigation throughout the United States. Its proper interpretation and legal effect and the rules of law applicable to it are matters of very general interest and importance.

2. **Conflict with the decisions of other Circuit Courts of Appeals.**

The decision in this case and that in the Shane case, supra, with which it agrees, are in sharp conflict with

the decisions of the Circuit Courts of Appeals in several of the circuits.

The Shane case, quoting from a Missouri case, makes this very clear statement of the conflicting views on the same subject:

> There are two clearly defined lines of cases on this question. One holds that, where an unusual or unexpected result occurs by reason of the doing by insured of an intentional act, where no mischance, slip, or mistake occurs, in doing the act itself, the ensuing injury or death is not caused through accidental means; that it must appear that the means used was accidental, and it is not enough that the result may be unusual, unexpected, or unforeseen.
>
> The other line of cases holds that, where injury or death is the unusual, unexpected or unforeseen result of an intentional act, such injury or death is by accidental means, even though there is no proof of mishap, mischance, slip or anything out of the ordinary in the act or event which caused such injury or death.

This case and the Shane case take their places in the first line and, in effect, announce the rule that when injury follows an intentional act, whether it be one which is ordinarily safe and from which no injury is reasonably to be expected and whether it be done with or without knowledge of conditions which made it dangerous, such injury cannot be said to be effected through accidental means unless it affirmatively appears that something unin-

tentional on the part of the insured occurred to prevent him from performing the act in the manner intended.

On the other hand there are numerous cases in the Second Circuit (Aetna Life v. Brand, 265 Fed. 6), the Third Circuit (Maryland etc. v. Spitz, 246 Fed. 817), the Fourth Circuit (Mutual Life v. Dodge, 11 Fed. [2] 486), the Fifth Circuit (State Life v. Allison, 269 Fed. 93), and the Ninth Circuit (Jensma v. Sun Life, 64 Fed. [2] 457), which are in the second line of cases.

These cases adhere to the rule that an injury, though following an intentional act, is effected by accidental means if it is something which usually or in the ordinary course of things does not result from such an act, and hence is not reasonably to be expected.

3. **Error below.**

Upon both reason and authority the judgment below is erroneous.

Wherefore, it is respectfully submitted that the writ prayed for should be granted.

WILLIAM L. FRIERSON,
Attorney.

R. H. WILLIAMS,
R. P. FRIERSON,
Of Counsel.

BRIEF.

The opinion of the court below is reported in 65 Fed. (2), at page 232. And it will be insisted that:

(1) The writ of certiorari should be granted.

(2) The judgment below is erroneous.

I.

THE WRIT SHOULD BE GRANTED.

1. **Importance of the question.** The language in question has been in general use for more than half a century and its legal effect is of great interest to thousands of policy-holders and to practically all companies which insure against accidents. It has been and still is the subject of frequent litigation. Divergent views with respect to it have been expressed by both federal and state courts and members of the same court. And this diversity of views has grown out of differing interpretations of an opinion of this Court.

2. **Conflict with other Circuits.** As stated in the petition, there are two sharply conflicting lines of cases. They divide on whether when an ordinarily harmless act is followed by an injury which, in the ordinary course of things, is not reasonably to be expected, it can, without more, be said that the injury is effected through accidental means.

The decision below answers this in the negative. Giving no weight whatever to the allegations that insured's act in playing golf was one which he was accustomed to perform in perfect safety and which others performed at the same time and place without injury and from which harm was not, in the ordinary course of things, to be expected, the Court stated its conclusions thus:

> "These counts disclose that the operative cause of insured's death was his voluntary exposure to the heat of the sun while playing golf. The high temperature was natural and not accidental and it is not alleged that the insured's acts and conduct upon the golf course were other than what he intended" (Rec., p. 29).

If there could be any misunderstanding, it would be removed by the fact that the Court approved Order of United Commercial Travelers v. Shane, 64 Fed. (2) 55, and that case expressly disapproves the cases which do not require an affirmative showing that the insured was, by some accident or mishap, prevented from performing the act in the manner intended.

This is exactly the opposite of the rule which prevails in several of the other circuits. The rule there applied is that one is presumed to intend the ordinary and reasonably to be expected results of his voluntary act. Hence when injury is to be reasonably expected, it is not brought about through accidental means. But when the act is an ordinarily harmless, or, like playing golf, a healthful one,

from which, in the usual course of things, injury does not result, the insured is presumed to have intended and expected to perform it safely, especially if others do perform it without harm at the same time or if he is accustomed to so perform it himself. And if he is ignorant of some fact or condition which, if known, would have deterred him, this ignorance is the accidental element which prevents the act, as performed, from being intentional. In all these cases there is a presumption that the injury was brought about through accidental means.

Ninth Circuit. The latest case is Jensma v. Sun Life Insurance Company, 64 Fed. (2) 457. Death of insured followed the administration of an ordinarily harmless hay-fever remedy. The remedy was administered in exactly the way intended. The contention was that, since, to warrant recovery, the injury must have been produced through accidental means, "it will not suffice if it merely appears that it was accidental in the sense that it could not reasonably have been anticipated."

But the Court rejected this contention, citing, among other cases, Lewis v. Ocean Accident etc., 224 N. Y. 18, in which Mr. Justice Cardozo said:

> "But our point of view in fixing the meaning of this contract must not be that of the scientist. It must be that of the ordinary man. * * * Such a man would say that the dire result, so tragically out of proportion to its trivial cause, was something unforeseen, unexpected, extraordinary and unlooked-for mishap,

and so an accident. The test—the one that is applied in the common speech of men—is also the test to be applied by the courts."

And the Ninth Circuit Court of Appeals, stating its own conclusion, said:

"In the present advanced state of medical science such a tragic result from a simple hay fever injection is 'unforeseen, unexpected, unusual.' As we have already intimated, we need not know at what precise instant of time, by what precise instrumentality, or through what precise avenue the deadly organisms entered the insured's body; for it is in the very nature of an accident that its exact causes should not be susceptible of mathematical demonstration.

"All the substantial evidence requires the conclusion that death was the result of violent, external and accidental means."

Second Circuit. Aetna Life Insurance Company v. Brand, 265 Fed. 6. The insured was operated on. In performing the operation, and sewing up the wound, the surgeon did exactly what he intended. But it happened that an artery, which, unknown to the surgeon, was not in its usual location, was pricked by the needle. The Court held that, by reason of the surgeon's ignorance of the misplaced artery, the injury was effected through accidental means, saying:

"The thing that was unexpected and unusual in this instance was the perhaps congenital misplacement of

an artery. We think this element of the act of sewing up the surgeon's cut was, within the definition, as truly accidental as would have been the case had the surgeon's needle broken."

Third Circuit. Maryland etc. v. Spitz, 246 Fed. 817. A butcher had died from infection caused by scratching a scab with bloody hands. A recovery was denied but only because the infection "was a probable result, one to be reasonably expected" from the intentional act.

Fourth Circuit. Mutual Life Insurance Co. v. Dodge, 11 Fed. (2) 486. Novocaine was administered to Dodge who, unknown to himself or the surgeon, happened to have a supersensibility to this ordinarily harmless drug. The Court said:

"In the act which preceded the death of the insured there 'was something unforeseen, unexpected and unusual' to use the expression of Justice Blatchford, viz., the application of the novocaine to one who had an "idiosyncrasy' or 'hypersensibility' to the drug. It is true that the doctor intended to apply the drug and the insured intended that he should apply it; but neither intended to apply it to a body possessed of the idiosyncrasy."

Fifth Circuit. State Life Insurance Co. v. Allison, 269 Fed. 93. Insured was a soldier and was killed in battle. The Court said:

"Of the millions of Americans who served as soldiers in the war with Germany comparatively few were wounded or killed in battle. * * * Whether the injury or death of a particular soldier is a consequence of his participation in a battle ordinarily depends on his happening to be or not to be in the path of a missile of war. It cannot be said that the wounding or killing of any particular soldier belonging to a force going into battle is so far a natural and to be expected consequence of his being so exposed to danger as to prevent a casualty happening to him properly being regarded as within the category of accidents."

The rules of law applied in the present case are in irreconcilable conflict with the cases cited from other circuits.

II.

THE DECREE BELOW IS ERRONEOUS.

The conflicting cases to which we have referred have resulted from differing interpretations of Mutual Accident Association v. Barry, 131 U. S. 100, decided in 1885, and ever since accepted as authority in state as well as federal courts.

If the court below has correctly interpreted that case, its judgment should be affirmed. But if the other courts to which we have referred have correctly interpreted it, the judgment must be reversed.

In the Barry case the question was whether the insured's death resulted from injuries effected through accidental means. Barry, a physician 30 years of age and in robust health, in company with two of his colleagues, jumped from a platform four or five feet from the ground. The other two jumped first and alighted safely, but Barry suffered a stricture of the duodenum and died.

No one saw him when he jumped or when he landed or in the interval between jumping and landing. The only evidence throwing any light on the precise cause of the injuries was the testimony of his companions that the sound made when he came in contact with the ground attracted their attention and caused them to inquire whether he was hurt; that, from this sound, it seemed to them that he "came down solid on his heels," instead of striking first on his toes and bending his knees so as to break the shock.

From these facts it appeared, of course, that the act of jumping was intentional. If the injury was one reasonably to be expected in the usual course of things, there was no accident and no case for the jury. The only evidence bearing on this question was the fact that two men had just made the same jump and alighted without injury.

From the testimony of the insured's companions, it might be inferred that the injury resulted from the manner in which the landing was made. And another fair inference from the same evidence was that the manner in which the landing was made was one from which injury

was reasonably to be expected. If this was the case and he landed in the way he intended, with knowledge of the danger, there was still no accident and no case for the jury.

There was no ground upon which a verdict could rest unless the jury was at liberty to say that either (1) he did not intend to land as he did or (2) he did so intend but was ignorant of the danger. And there was no direct evidence as to how he intended to land, or that he was ignorant of the proper way to land. Neither of these facts could be established except by presumptions.

The Court held that (1) "the jumping from the platform was the means by which the injury was caused"; (2) "the question was whether there was anything accidental, unforeseen, involuntary, unexpected, in the act of jumping, from the time the deceased left the platform until he alighted on the ground"; (3) the term "accidental" was used in the policy in its ordinary popular sense, as meaning "happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected"; (4) "if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means," but (5) "if in the act which precedes the injury something unforeseen, unexpected, unusual occurs which produces the injury, then the injury has resulted through accidental means."

These were the rules by which this Court tested the con-

tention that there was no evidence to support a verdict for the plaintiff. As we have seen, there was no affirmative evidence that insured did not land exactly as he intended, or of anything that happened between the act of jumping and the landing. There was no evidence to support the verdict unless some accidental intervention was to be presumed from the unusual result. And the Court expressly based its decision on such a presumption, stating its reason for rejecting the contention thus:

> "The two companions jumped from the same platform at the same time and place and alighted safely. It must be presumed not only that he intended to alight safely, but thought that he would. The jury was, on all the evidence, at liberty to say that it was an accident that he did not."

So here, the means by which the injury was caused was the act of the insured in exposing himself to the rays of the sun by playing golf. Playing golf does not, in the usual course of things, result in injury. On the contrary, it is widely recognized as a health-giving recreation. Thousands play it constantly without harm to themselves. On the day of insured's death others played, without injury to themselves, on the same links. It must, therefore, be presumed not only that he intended to play safely, but thought he would. Hence a jury, on proof of the facts alleged, would be at liberty to say that it was an accident that he did not.

The error in the decision below is that it is based entirely on the rule that if an injury follows an intentional act without some intervening accident or involuntary act it is not effected by accidental means, but ignores what we think was expressly decided in the Barry case, that there is ample evidence of such intervention when the injury is one which could not be reasonably expected from the intentional act.

Unless this is the law, accident insurance is a very different thing from what the insured think it is. Men carry accident insurance to protect against mishap in the course of their usual avocations and recreations. The things they do are not ordinarily followed by injury. But there is scarcely an act which one does in the pursuit of his business or his recreations which is not sometimes followed by unexpected and unaccountable injury. It is protection against such unexpected injuries which the man in the street understands he gets when he buys accident insurance. Such insurance is of little value if it does not protect merely because the injury happens to follow an intentional act. And this result, according to the Barry case, is avoided by the very fair presumption that the insured intended only the consequences which ordinarily follow the act; and that, when he does what he did and others are accustomed to do without injury, he intends and expects to do it in safety, and that the unintended and unexpected injury is brought about by chance or mishap, or, as expressly al-

leged in the third count, by ignorance of an existing circumstance or condition which rendered his ordinarily safe act dangerous and thus transformed an intentional into an unintentional and accidental act.

WILLIAM L. FRIERSON,
Attorney.

R. H. WILLIAMS,
R. P. FRIERSON,
Of Counsel.